

February 25, 2014

Rod Hsiao, Trustee  
San Mateo County Board of Education  
14 S. Eldorado St.  
San Mateo, CA 94401

Re: Your Request for Advice  
**Our File No. A-14-002**

Dear Mr. Hsiao:

This letter responds to your request for advice regarding applicable conflict-of-interest provisions. Please note that our advice is based on the Government Code Section 1090. In light of the conclusion regarding the application of Section 1090, we are not providing a full analysis of the conflict-of-interest provision under the Political Reform Act (the “Act”).<sup>1</sup> We offer no opinion on the application of other laws, which may apply, such as common law conflict-of-interest laws or restrictions on incompatible activities your agency may impose. You should consult your agency’s counsel regarding these provisions. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

As required by Section 1097.1(c)(5), we have forwarded your request to both the Attorney General’s Office and the San Mateo District Attorney’s Office. We have not received a response from either office. Finally, we are required to advise you that Section 1090 advice issued by the Commission applies only to proceedings brought by the Commission, and the advice is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

### QUESTION

As a Trustee of the San Mateo County Board of Education, may you market the services of your private employer, ActivityHero, to the 22 school districts within the county?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## CONCLUSION

Under Section 1090, you are prohibited from being financially interested in contracts made in your official capacity or made by boards or commissions of which you are a member. As analyzed below, this prohibition extends to contracts by the districts within San Mateo County in light of your agency's budgetary authority over the districts. Accordingly, ActivityHero may not contract to provide services to the districts within San Mateo County.<sup>2</sup>

## FACTS

You are currently an elected Trustee of the San Mateo County Board of Education (the "Board of Education") and recently joined a start-up business called ActivityHero as Chief of Strategy and Business Development. Your responsibilities at ActivityHero include promoting and selling an online service to schools that would enable parents to easily search and find appropriate after-school and summer camps for their children. You will receive an annual salary and equity share from ActivityHero.

As contemplated, schools purchasing services from ActivityHero would pay for the service integration with their school websites and possibly a monthly fee of less than \$1,000 per month. ActivityHero would also charge after-school/camp providers for a percentage of the enrollment registration fees paid by parents. The annual revenue from a large school partnership contract in San Mateo County could conceivably be in excess of \$20,000 a year. You anticipate marketing ActivityHero throughout the San Francisco Bay Area and ultimately nation-wide. In particular, you ask whether or not the Act prohibits you from marketing ActivityHero services to the 22 school districts within San Mateo County.

You state that you have little contact as Trustee with individual districts except for the appeal of inter-district transfer decisions and student expulsions. You also state that the San Mateo Office of Education (the "Office of Education") is responsible for reviewing and certifying individual school budgets, that this review is conducted by the office's Chief Business Officer, and that this officer reports to the independently elected Superintendent. Nonetheless, the Board of Education is responsible for approving the Office of Education's budget.

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<sup>2</sup> Under the Act, we caution that you have an economic interest in ActivityHero and may not make, participate in making, or use your position to influence a decision with a reasonably foreseeable material financial effect on the company. (Section 87100; Regulation 18700(a).) For your purposes, you may not contact or appear before any member, officer, employee, or consultant of the districts for the purpose of marketing the services of the company. (Regulation 18702.3(a).) Moreover, you may not market ActivityHero to districts outside of the county (but within the state of California) if you act or purport to act on behalf of, or as the representative of, your agency. (Regulation 18702.3(b).) Finally, Section 87407 also prohibits officials from making, participating in making, or using their official position to influence decisions affecting persons with whom they are negotiating employment, or have any arrangement concerning employment. (See Regulation 18747.) However, you have already accepted employment with ActivityHero and the Commission does not provide advice with respect to past conduct. (See Regulation 18329(b)(8)(A) and (c)(4)(A).) Thus, we provide no opinion regarding the application of Section 87407.

## ANALYSIS

Section 1090 covers contracts made by public officials, providing in part:

“Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.”

Section 1090 generally prohibits public officers from being financially interested in contracts made by them in their official capacity or made by boards or commissions of which they are members. (87 Ops.Cal.Atty.Gen. 23, 24 (2004).) The purpose “is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear upon an official’s decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct.” (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) The statutory goal is “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.) A contract that violates Section 1090 is void and unenforceable. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) Importantly, Section 1090’s prohibition applies regardless of whether the contract would otherwise be fair and equitable (*id.* at pp. 646-649), and a board member with a proscribed interest may not avoid the prohibition by abstaining from the decision-making process; the entire board is prohibited from executing the agreement if the prohibition is applicable. (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211-212.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest,” and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

Under the facts provided, you are an employee of ActivityHero, were hired as the Chief of Strategy and Business Development to promote and sell the company’s services, and will receive an equity share in the business. Because you were specifically hired to market ActivityHero and will receive an equity share, we find a financial interest in ActivityHero contracts with the districts.

In light of your financial interest in any contract between ActivityHero and districts within San Mateo County, we must determine whether your general duties as a trustee are sufficient to constitute participating in making a decision regarding any proposed contract for purposes of disqualification under Section 1090. As stated in *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237:

“Although section 1090 refers to a contract ‘made’ by the officer or employee, the word ‘made’ is not used in the statute in its narrower and technical contract sense but is used in the broad sense to encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. [Citation.] Such construction is predicated upon the rationale that government officers and employees are expected to exercise absolute loyalty and undivided allegiance to the best interests of the governmental body or agency of which they are officers or employees, and upon the basis that the object of such a statute is to remove or limit the possibility of any personal influence, either directly or indirectly which may bear on an officer's or employee's decision. [Citation.]”

When a governmental board ultimately has the authority over the contracts made by a subordinate decision maker, generally the board members have participated in the resulting contract thereby triggering Section 1090 by exercising their authority to review or not to review the contracts. (See *City of Imperial Beach v. Bailey, supra*, 103 Cal.App.3d at p. 195 [where the city council has authority to approve the city’s unilateral action to set the rate charged to a concession stand, “it is not [the councilmember’s] participation in the voting which constitutes the conflict of interest [under Section 1090], but her potential to do so”]; 88 Ops.Cal.Atty.Gen. 122, 124 (2005) [a city council has indirectly participated in the city’s decisions regarding advertising rates in the city’s quarterly brochure because “in effect” the city council approves the advertising rates in approving the proposed revenue derived from advertising specified in the city budget]; 87 Ops.Cal.Atty.Gen. 9 (2004) [the governing board of a school district may not avoid Section 1090 by adopting a policy delegating to the district superintendent its authority to contract on behalf of the district].) However, a governmental board may avoid violating Section 1090 when the contract is made by an “independent” government official and that official does not have a conflict of interest. (See 81 Ops.Cal.Atty.Gen. 274 (1998), 57 Ops.Cal.Atty.Gen. 458 (1974)], and 21 Ops.Cal.Atty.Gen. 90 (1953).)

In the present circumstances, we must determine whether the Board of Education’s authority over the districts within San Mateo County is sufficient to establish participating in resulting district contracts or whether the districts are independent from the Board of Education. In making this determination, we are guided by *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91, which applies the “*in pari materia*” canon of statutory construction in determining that Section 1090 should be harmonized with the Act when possible. As explained by the court, “it is well established that Section 1090 and the Act are “*in pari materia.*” (*Ibid.*) “Statutes ‘*in pari*

*materi*’ should be construed together so that all parts of the statutory scheme are given effect.” (*Ibid.*, citing *People v. Lamas* (2007) 42 Cal.4th 516, 525.)<sup>3</sup>

Section 87100 of the Act prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).)

For purposes of the Act, the Commission has imposed a broad restriction against contacting, or appearing before, or otherwise attempting to influence, any member, officer, employee or consultant of the official’s agency or any agency appointed by or subject to the budgetary control of the official’s agency. (Regulation 18702.3(a).) However, when the decision is within or before any other agency, an official is restricted from making an appearance or communication only if the official acts or purports “to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency.” (Regulation 18702.3(b).) Moreover, for purposes of determining when an official is appearing before his or her own agency, we have previously advised:

“[I]t is important to realize that staff does not exist in a vacuum; it is not a generic entity with its own identity. Rather, staff is a component of the agency to which it is assigned. An ‘agency’ includes the staff assigned exclusively to a public official’s agency (*Larmore* Advice Letter, No. A-00-275; *Martello* Advice Letter, No. A-85-190) as well as staff that [is] shared between that and another agency (*West* Advice Letter, No. A-88-413).” (*Farrell* Advice Letter, No. I-03-121.)

It is telling that the Commission has focused on appointive and budgetary control for determining when an agency’s control over another agency requires the official to disqualify him or herself as if the official were appearing before his or her own agency. For purposes of Section 1090, it is also difficult to establish independence in the agency’s contractual authority if the agency is subject to the appointive or budgetary control of another agency because of the influence the controlling agency wields over the subordinate agency. Accordingly, we find appointive and budgetary control sufficient to establish participating in resulting district contracts for purposes of Section 1090.

Based on the facts submitted, the Office of Education serves both the Board of Education and the independently elected superintendent. Notwithstanding the office’s dual role, the office serves as staff for the board, and therefore your “agency” includes the Office of Education. Moreover, because the school districts are within the budgetary control of the Office of Education, we find the budgetary authority over the districts sufficient to establish participating

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<sup>3</sup> Statutes are “*in pari material*” if “they relate to the same person or thing, to the same class of person[s] or things, or have the same purpose or object.” (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn.4.)

in resulting district contracts. For this reason, ActivityHero is prohibited under Section 1090 from contracting with the districts to provide its services.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Brian G. Lau  
Counsel, Legal Division

BGL:jgl